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# IF THE PROFILE FITS: ADMITTING CRIMINAL PSYCHOLOGICAL PROFILES INTO EVIDENCE IN CRIMINAL TRIALS

## I. INTRODUCTION

On June 29, 1988, the New Castle County (Delaware) Police discovered the body of a woman at a construction site.<sup>1</sup> The police found the woman naked, lying on her back with head injuries, tape residue on her face, gray duct tape in her hair, and bruising around her neck, nipples, wrists, and ankles.<sup>2</sup> Although the police found tire tracks leading to the body and blue fibers at the crime scene, they were unable to locate footprints or significant quantities of blood.<sup>3</sup>

An autopsy report revealed that a blunt instrument caused the woman's head injuries, a gripping instrument caused her breast injuries, and the bruises were the result of ligature strangulation and the binding of her hands and feet.<sup>4</sup> The FBI analyzed the fibers retrieved from the crime scene and discovered that they had come from a carpet.<sup>5</sup> After further investigation, the detective in charge learned of an earlier unsolved 1987 murder that occurred at a construction site three to five miles from the 1988 victim.<sup>6</sup> The earlier crime scene was identical to the 1988 scene in all respects, except

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1. See *State v. Pennell*, 1989 WL 112555 (Del. Super. Ct. Sept. 12, 1989); see also JOHN DOUGLAS & MARK OLSHAKER, *MINDHUNTER: INSIDE THE FBI'S ELITE SERIAL CRIME UNIT* 252-54 (1995) (relating the history of *State v. Pennell* from the FBI's perspective).

2. See *Pennell*, 1989 WL 112555, at \*1.

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.* at \*2.

that the earlier victim was partially clothed.<sup>7</sup> Four days after the 1988 victim's body was found, the New Castle Police asked the FBI to review the evidence and create a criminal psychological profile.<sup>8</sup>

After analyzing the crime scene evidence, the victimology, and geographic locations where each victim was found, the FBI profilers generated a criminal psychological profile.<sup>9</sup> The profile indicated that the offender was probably a twenty-five to thirty-five-year-old white male who resided near the area where the killings occurred and who worked in the construction trades.<sup>10</sup> The profile also stated that the offender drove a van and accumulated many miles while cruising for victims.<sup>11</sup> In conversations, he would present a macho image and would enjoy dominating women, while having no difficulty maintaining a steady relationship with a wife or girlfriend.<sup>12</sup> In preparation for the crimes, the perpetrator would bring the weapons required and destroy any evidence upon the completion of his acts.<sup>13</sup>

With the FBI's criminal psychological profile in hand, the New Castle Police began an undercover operation to apprehend the killer, and, within a few days, they arrested the offender and seized his van.<sup>14</sup> At trial, the defendant moved to suppress the carpet fibers that were retrieved during the undercover operation.<sup>15</sup> The Delaware Superior Court upheld the seizure of the van fibers, however, primarily because of the criminal psychological profile.<sup>16</sup> The profile also played a role in the conviction of the defendant: FBI agents testified to the similarities between the murders and the fact that the same person had committed each one. However, the court did not admit into evidence the actual profile used to determine whether the

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7. *See id.* at \*2.

8. *See id.*

9. *See id.*

10. *See id.*

11. The van was necessary because multiple crime scenes would exist. *See DOUGLAS & OLSHAKER, supra* note 1, at 252. There was the pick-up point, the scene of the actual torture and killing, and the disposal site. *See id.* In order to transport the victim successfully and without drawing suspicion, a large vehicle was necessary. *See id.*

12. *See id.*

13. *See id.* at 252-53.

14. *See id.*

15. *See id.*

16. *See infra* notes 91-109 and accompanying text for a discussion of the role of profiles in probable cause.

defendant had committed the crimes.<sup>17</sup>

This Note addresses two aspects of criminal psychological profiling: (1) it introduces criminal psychological profiles to practitioners in order to encourage the use of such profiles, and (2) it argues for the admission of criminal psychological profiles into evidence during trial. Part II of this Note will address the first aspect by describing criminal psychological profiles and illustrating their use. Part III will place criminal psychological profiles within the evidentiary framework of expert testimony through an examination of other types of scientific and non-scientific evidence used in criminal trials. Finally, Part IV discusses the second aspect of this Note, advocating the admissibility of criminal psychological profiles as permissible character evidence and as a credible basis for expert testimony. Additionally, Part IV will address the misuse and misunderstanding of profiles in the context of evidentiary rules.

## II. CRIMINAL PSYCHOLOGICAL PROFILING

Criminal psychological profiling has its initial roots in Sir Arthur Conan Doyle's and Agatha Christie's crime novels.<sup>18</sup> The detective characters in those novels would pay close attention to crime scene details and then would formulate a profile of the type of person most likely to commit the crime.<sup>19</sup> Police detectives began to mimic their fictitious counterparts in these novels by occasionally seeking psychologists' impressions after observing crime scene evidence of a perpetrator's personality.<sup>20</sup> This procedure proved helpful in

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17. See *Pennell*, 1989 WL 112555, at \*9.

18. See DOUGLAS & OLSHAKER, *supra* note 1, at 33; see also Joseph T. McCann, *Criminal Personality Profiling in the Investigation of Violent Crime: Recent Advances and Future Directions*, 10 BEHAV. SCI. & L. 475, 475 (1992).

19. See, e.g., SIR ARTHUR CONAN DOYLE, *THE COMPLETE SHERLOCK HOLMES* 90 (Doubleday 1930).

20. The first modern case involving a criminal psychological profile (though not termed as such) was the "Mad Bomber" case in the 1950s. See DOUGLAS & OLSHAKER, *supra* note 1, at 33. After a series of bombings at public landmarks in New York City, the police contacted a psychiatrist, Dr. James Brussel, who studied crime scene photographs and letters sent to a newspaper by the bomber. See *id.* Through his analysis, Dr. Brussel concluded that the bomber lived in Connecticut, hated his father and obsessively loved his mother. See *id.* at 33-34. He concluded his profile with the following statement: "Look for a heavy man. Middle-aged. Foreign born. Roman Catholic. Single. Lives with a brother or sister. When you find him,

apprehending criminals and, with profiling's increased popularity, the FBI's Quantico, Virginia training facility began looking into different profiling techniques.<sup>21</sup> After years of researching the criminal mind and borrowing from the fields of psychology and sociology, criminal psychological profiling became an important part of the FBI's investigations into serial and sexual offenses.<sup>22</sup>

### *A. Principles of Criminal Psychological Profiling*

A criminal psychological profile attempts to provide investigators with specific information about an offender based on an examination of a crime scene.<sup>23</sup> Profiles do not identify the specific person who committed an offense, but, rather, describe the type of person most likely to have committed the offense.<sup>24</sup> Therefore, this information can assist with the investigation, apprehension, and prosecution of the offender.<sup>25</sup> A profile has three basic goals: (1) social and

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chances are he'll be wearing a double-breasted suit. Buttoned." *Id.* at 34. Applying the profile to the already narrowed field of suspects, the police apprehended an individual fitting the description laid out by Dr. Brussel. *See id.* Dr. Brussel's conclusion was amazingly accurate, to the point that the suspect emerged from his bedroom wearing a buttoned double-breasted suit. *See id.*

21. *See id.* at 34-35.

22. *See generally id.* at 101-24 (providing a historical account of the development and uses of criminal psychological profiling techniques by the FBI).

23. *See* RONALD M. HOLMES & STEPHEN T. HOLMES, *PROFILING VIOLENT CRIMES: AN INVESTIGATIVE TOOL 2* (2d ed. 1996).

24. *See* John E. Douglas et al., *Criminal Profiling from Crime Scene Analysis*, 4 *BEHAV. SCI & L.* 401, 402 (1986).

25. Profiles assist with the prosecution of offenders in ways other than admitting the actual profile into evidence. For example, profiles have been used in several cases to establish probable cause to search a residence. *See* *Brinegar v. United States*, 338 U.S. 160, 171-73 (1949); *State v. Pennell*, 1989 WL 112555 (Del. Super. Ct. 1989). Investigators have also used profiles to elicit confessions from suspected offenders. *See* JOHN E. DOUGLAS ET AL., *CRIME CLASSIFICATION MANUAL: A STANDARD SYSTEM FOR INVESTIGATING AND CLASSIFYING VIOLENT CRIMES* 306-08 (1992). Along with the typical contents of a profile, investigators will also include suggestions of how to interview an apprehended offender. *See id.* For example, an officer who has the criminal psychological profile of a person he is interviewing will know certain personality traits of the offender that can be exploited to secure a confession. *See id.* at 307. An officer can take advantage of this personality knowledge and attempt to persuade the offender to confess by formulating different interview approaches that conform to the offender's personality characteristics. *See id.* at 307-08.

The FBI employed this technique from the beginning of its profiling efforts. In the case of Mary Frances Stoner, a twelve-year-old Georgia girl who had disappeared after a school bus dropped her off near her home, the FBI was able to gain a confession by placing the murder

psychological assessment of the offender, (2) the evaluation of belongings found in the suspected offender's possession, and (3) suggesting strategies for interviewing the suspected offender upon apprehension.<sup>26</sup> Although criminal psychological profiling is helpful with the investigation, apprehension, and prosecution of an offender, only certain types of offenses lend themselves to profiling.<sup>27</sup> Such offenses include "motiveless" murder,<sup>28</sup> rape and sexual assault,<sup>29</sup> and arson.<sup>30</sup> Profiles assist in the investigations of these crimes because offenses of these types tend to reveal something about the offender's personality and behavior.<sup>31</sup>

Creating a criminal psychological profile involves an in-depth study of the crime scene and the victim as well as psychological and sociological data.<sup>32</sup> When members of the FBI's Investigative

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weapon in the interrogation room and relating to the offender that they understood his situation. *See* DOUGLAS & OLSHAKER, *supra* note 1, at 190-92. The police were instructed to conduct the interview at night so that the offender was more comfortable and, at the same time, understood that the police were serious about the crime. *See id.* at 190. The police also stacked large files with the offender's name on them on the table in front of where the offender sat. *See id.* The police not only cast blame on the victim, but also related that they understood how the offender felt and provided him with an explanation for his actions. *See id.* When the police confronted the offender with the murder weapon, he became nervous and confessed to the crime. *See id.* at 192.

26. *See* HOLMES & HOLMES, *supra* note 23, at 3.

27. *See* Douglas et al., *supra* note 24, at 402-03.

28. A motiveless murder is a homicide where the reason for killing is not readily apparent. *See* DOUGLAS ET AL., *supra* note 25, at 99. The FBI classifies homicides into six distinct styles: single, double, triple, mass, spree, and serial. *See* Douglas et al., *supra* note 24, at 408. A single homicide involves one victim and one homicidal event. *See id.* A double homicide involves two victims and one event in the same location. *See id.* A triple homicide involves three victims and one event in the same location. *See id.* Four or more victims in one event at the same location is referred to as a mass homicide. *See id.* A spree murder involves multiple victims in multiple locations with no cooling-off period between the murders. *See id.* at 409. Finally, a serial murderer, the type usually requiring a profile, is one who commits three or more killings at separate times with a cooling-off period between each one. *See id.* A serial murderer will also differ from a mass or spree killer because the serial offender will target specific victims. *See id.* Spree and mass murderers are more interested in the quantity of kills rather than who they kill. *See id.* at 409.

29. Rape and sexual assault are conducive to profiles because of the communication between the victim and offender. *Cf.* DOUGLAS ET AL., *supra* note 25, at 196-97. Such communication and the method of abducting and carrying out the assault reveal important information about the offender. *See id.*

30. The method used by an arsonist to start a fire reveals information about the offender. *See* HOLMES & HOLMES, *supra* note 23, at 111-12.

31. *See* Douglas et al., *supra* note 24, at 402-03.

32. *See* HOLMES & HOLMES, *supra* note 23, at 39. Former FBI Special Agent John

Support Unit<sup>33</sup> create a profile, they follow a series of five overlapping stages.<sup>34</sup> These stages resemble a medical diagnosis in that a profiler will: (1) collect and assess data, (2) reconstruct the situation, (3) formulate a hypothesis, (4) test it against known information, and (5) report the results.<sup>35</sup>

A profile begins with the "Profiling Inputs Stage."<sup>36</sup> This step involves the accumulation of crime scene evidence, victimology,<sup>37</sup> forensic information, preliminary police reports, and photographs.<sup>38</sup> Once all of the information is collected, the profiler begins the "Decision Process Model Stage." In this stage, the profiler organizes and arranges the information into a meaningful pattern.<sup>39</sup> This process includes determining the type of crime committed,<sup>40</sup> the primary intent of the offender,<sup>41</sup> the risk of the victim,<sup>42</sup> the

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Douglas has stated that a profiler needs to get into the mind of the killer and the victim in order to fully understand what occurred between the offender and victim during the commission of the crime. See JOHN DOUGLAS & MARK OLSHAKER, *JOURNEY INTO DARKNESS* 28 (1997).

33. The Investigative Support Unit (ISU) of the FBI creates the profiles used by the FBI and other law enforcement agencies who request them. Cf. DOUGLAS & OLSHAKER, *supra* note 1, at 370.

34. See Douglas et al., *supra* note 24, at 406-15. Douglas terms the stages: (1) Profiling Inputs Stage, (2) Decision Process Models Stage, (3) Crime Assessment Stage, (4) Criminal Profile Stage, and (5) Investigation Stage. See *id.*

35. See *id.* at 405.

36. See *id.* at 407.

37. A study of the victim is necessary to generate a useful and valid profile of the offender. See HOLMES & HOLMES, *supra* note 23, at 181. The victimology, or the study of the crime victim, assists in identifying the motive for the crime. See DOUGLAS ET AL., *supra* note 25, at 7. The profiler considers the victim's physical traits, marital status, lifestyle, occupation, education, personal demographics, medical history, personality, criminal history, and last activities. See HOLMES & HOLMES, *supra* note 23, at 181. An examination of these characteristics may reveal important information about the offender. For example, a disorganized offender who commits a crime in order to prove his dominance over women will select an easily manipulated and controlled victim. See HOLMES & HOLMES, *supra* note 23, at 125.

38. See *id.*

39. See *id.* at 406.

40. As a means of standardizing the investigation of crimes for which profiles can contribute to the solution, the FBI's National Center for the Analysis of Violent Crime created the Crime Classification Manual. See DOUGLAS ET AL., *supra* note 25, at ix-x. The Manual classifies types of crimes under three main headings: homicide, arson, and rape and sexual assault. See *id.* at 1-2.

41. The primary intent of the offender may be criminal enterprise, emotional, selfish, cause-specific, or sexual. See Douglas et al., *supra* note 24, at 410.

42. The risk of the victim is the likelihood of the person being selected for the crime. See *id.* at 411. This determination is based on the victim's age, lifestyle, occupation, physical

willingness of the offender to take a risk, and the time and location<sup>43</sup> factors involved in the offense.<sup>44</sup> Based on this information, the profiler classifies the crime in the "Crime Assessment Stage."<sup>45</sup> This includes a reconstruction of how the crime took place, the type of crime, the level of organization at the crime scene relative to the victim's risk level, the control of the victim and sequence of events, the staging and the motivation for committing the crime, and the dynamics of the crime scene.<sup>46</sup> Upon completion of the classification of the crime, the profiling process continues with the "profile stage." This stage generates the actual profile, which includes information such as demographics, educational level and intellectual functioning, criminal history, military history, family history, habits and social interests, residence in relation to the crime scene, type of vehicle owned, personality characteristics, and suggested interview techniques.<sup>47</sup>

At the heart of the profile stage lies the profiler's knowledge of the offender's behavior. The profiler employs his or her behavioral information by using inductive reasoning to move from people with general characteristics to the specific offender profile.<sup>48</sup> For example, an organized or disorganized crime scene can provide behavioral

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stature, resistance ability, and location. *See id.*

43. With multiple offenses, the geographic locations of the crime scenes play an important role in profile construction. *See HOLMES & HOLMES, supra* note 23, at 148-49. Multiple crimes committed by the same person in a relatively close area are typical of an offender who does not feel comfortable committing the illegal act outside a familiar area. This indicates that the person lives or works close to the crime scenes. *See id.* at 154-55. An increase in crimes that take place further from the central location signifies that the offender has become more comfortable committing the crimes. *See id.*

Information may even be derived from the geographic location of only one crime scene. *See id.* at 155-56. For example, the "disposal site," the location where a victim's body is taken to be disposed of by the offender, is probably an area that is familiar to the offender and, therefore, may provide information about the person's occupation or residence. *See id.* at 154-56.

44. Location factors include the areas where the initial contact was made and where the crime occurred, and whether a difference existed between the crime and death scenes. *See id.* at 42.

45. *See id.* at 412.

46. *See id.* at 407. Of these factors, the offender's motive for committing the offense is considered the most important. *See DOUGLAS & OLSHAKER, supra* note 32, at 43. Only after determining the motive can the profiler begin to draw conclusions about the offender. *See id.*

47. *See McCann, supra* note 18, at 477.

48. *See DOUGLAS & OLSHAKER, supra* note 1, at 34.



information about a perpetrator.<sup>49</sup> The evidence from a disorganized crime scene would show a “blitz-style” attack with no set plan of action, indicating that the disorganized offender is probably of below-average intelligence, socially inept, lives alone and close to the crime scene, works in an unskilled profession, and, most likely, did not graduate from high school.<sup>50</sup> In contrast, an organized crime scene would indicate that the offender has high intelligence and is generally social.<sup>51</sup> In addition, he would likely be married or have a steady social relationship, and he would come across as masculine and charming.<sup>52</sup> These characteristics, however, are not dispositive for all

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49. A crime scene will not necessarily be organized or disorganized. *See DOUGLAS ET AL.*, *supra* note 25, at 133. In most cases there will be indications of both characteristics. *See id.* A mixed crime scene may be the result of multiple offenders with different personality traits or the deterioration of an organized plan after unanticipated events occur. *See id.* Also, the offender's personality may not be fully organized or disorganized, or the offender may have been under the influence of drugs or alcohol. *See id.* Finally, in the case of a serial offender, the external stress of an intensive police investigation may lead to the deterioration of the offender's personality. *See id.* at 133-34.

50. *See id.* at 129; HOLMES & HOLMES, *supra* note 23, at 48. The *Crime Classification Manual* depicts the murder of Jenny Sidal as an example of a classic disorganized crime scene. *See id.* at 131-32. Sidal had been assaulted, killed, and left at the same scene. *See id.* at 132. The offender used weapons of opportunity, namely his fists and arms, as opposed to a prearranged set of tools, to commit the crime. *See id.* When the offender attacked, he did so in a rapid manner and rendered his victim unconscious with one blow. *See id.* Also, the offender made no effort to conceal his crime. *See id.*

51. *See HOLMES & HOLMES*, *supra* note 23, at 52. Traits common to an organized offender include: careful planning of crimes, targeting of the victims, and a display of control at the crime scene. *See DOUGLAS ET AL.*, *supra* note 25, at 123. The case of Shari Faye Smith serves as an example of how an organized offender operates. *See DOUGLAS & OLSHAKER*, *supra* note 1, at 295-300. Shari Faye Smith was a senior in high school when she was abducted at the mailbox in front of her family's South Carolina home. *See id.* at 295. Her father found her car with the motor running, the door open, and Shari's purse on the front seat. *See id.* Soon afterward, the family received a distorted-voice phone call from the kidnapper, who informed them that a letter from Shari would arrive soon. *See id.* at 296. After several days another phone call followed, and the caller stated that he and Shari were “one.” *See id.* at 298. The next day another call came from the offender in which he gave precise details of the abduction and the time at which Shari wrote her letter to her parents. *See id.* at 299. The following day, the offender called again and gave precise details regarding how to locate Shari's body, though still not admitting that he killed her. *See id.* Tape residue was found at the crime scene, and the high level of body decomposition indicated that the offender had killed Shari soon after the abduction and then lied to her family regarding her condition so that the condition of her body would be such that it would be difficult to determine the cause of her death. *See id.* at 299-300. The delay in providing the location of the body, the skill needed to abduct Shari, and the precise directions and specific times mentioned by the offender all served as indications of an organized offender. *See id.* at 300.

52. *See HOLMES & HOLMES*, *supra* note 23, at 52.

profiles because most crime scenes will have both organized and disorganized characteristics.<sup>53</sup>

Once a profile is created, it is sent to the investigating officers for their investigative use.<sup>54</sup> In addition, the profiler rechecks all of the profile information so that there are no inconsistencies.<sup>55</sup>

The preceding process is a general methodology for creating criminal psychological profiles. Two important principles underlie this process.<sup>56</sup> First, criminal psychological profilers base their profiles, in part, on the principle that a personality will not deviate from its norm when committing crimes.<sup>57</sup> Such behavior manifests itself in the modus operandi ("MO"),<sup>58</sup> signature,<sup>59</sup> personation,<sup>60</sup> and staging<sup>61</sup> associated with the crime scene.<sup>62</sup> While the MO may

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53. See *supra* note 49 and accompanying text.

54. See Douglas et al., *supra* note 24, at 407.

55. See *id.* at 415. This process includes continuous updates to the profile as more physical evidence from the crime scene becomes available. See *id.*

56. Criminal psychological profiling operates under the basic assumption that a crime scene reflects an offender's personality. See HOLMES & HOLMES, *supra* note 23, at 39. The Investigative Support Unit has found support for this assumption through repeated investigations and interviews with offenders. See generally DOUGLAS & OLSHAKER, *supra* note 1, at 101-24 (providing detailed accounts of investigations and interviews of various criminal offenders). Psychological research into personality has also supported this assumption. Walter Mischel and Yuichi Shoda have conducted numerous studies designed to gather empirical support for their theory that a person's behavior can be accurately predicted based on a cognitive-affective personality theory. See Walter Mischel & Yuichi Shoda, *A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCHOL. REV. 246, 246 (1995). They reached the conclusion that a person's behavior will remain consistent only in similar external situations; in other words, a person will respond in a certain predictable way when faced with certain situations. See *id.* at 251, 257. This consistent response is termed the behavioral signature. See *id.* at 257. As applied to criminal psychological profiling, this research supports the basic assumption that an offender's personality will be revealed through a crime scene analysis. See DOUGLAS ET AL., *supra* note 25, at 261.

57. See DOUGLAS ET AL., *supra* note 25, at 249.

58. The term "MO" refers to learned behavior. See DOUGLAS & OLSHAKER, *supra* note 1, at 251. An offender's MO determines how the offender carries out his crimes, and it changes based on the situation. See *id.*

59. An offender's signature is something that must be done in order for the offender to receive the necessary satisfaction from committing the offense. See *id.*

60. Personation reveals the offender's fantasies. See DOUGLAS ET AL., *supra* note 25, at 250. The offender's crime is a manifestation of those fantasies and provides insight into the offender's mind. See *id.*

61. A "staged" crime scene occurs when a person alters the scene prior to the police's arrival. See DOUGLAS ET AL., *supra* note 25, at 251. Staging at a crime scene serves one of two purposes: it either protects the victim or diverts attention from the actual offender. See *id.* Such

change as the offender becomes more comfortable, the personation and signature will not.<sup>63</sup>

A second general principle underlying criminal psychological profiling is that those who create criminal psychological profiles must possess certain qualifications.<sup>64</sup> First, the person must have a background in psychology.<sup>65</sup> This knowledge permits the profiler to understand the mental dynamics involved in a crime.<sup>66</sup> A knowledge of sociology is also essential as it allows the profiler to understand the social context surrounding the offense and how that context can affect the offender.<sup>67</sup> However, the most important qualification a profiler must possess is experience in criminal investigation.<sup>68</sup> With

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actions are usually taken by someone who knows the victim. *See id.* at 252. For example, in 1982, the FBI received a request for assistance in a crime that appeared to be a routine burglary that ended up in sexual assault and murder. *See DOUGLAS & OLSHAKER, supra* note 32, at 44. The victim was found face-up on her living room floor with her dress pulled up over her waist and her underwear around her knees. *See id.* The room was in complete disarray; however, there were no signs of a struggle, nor were there defensive wounds to the body. *See id.* The victim had been killed with a hammer that belonged to her and her husband. *See id.* The hammer was found in the kitchen where the offender had attempted to clean it. *See id.* In addition, the husband reported some jewelry missing. *See id.* When the medical examiner finished the autopsy of the victim's body, he concluded that there was no evidence of sexual assault and that the victim had been drinking. *See id.* From this information, the FBI deduced that the offender was someone the victim knew well. *See id.* The FBI further speculated that an argument had ensued while the offender and the victim were drinking and that the offender lost control at some point and subsequently staged the scene to appear as if a random robbery, sexual assault, and murder had taken place. *See id.* at 44-45. With this knowledge, the police suspected the husband was the culprit. *See id.* at 45. The husband later confessed to the crime. *See id.*

62. *See* Mischel & Shoda, *supra* note 56, at 251-52.

63. *See* DOUGLAS & OLSHAKER, *supra* note 1, at 251; DOUGLAS ET AL., *supra* note 25, at 251.

64. John Douglas has set forth the qualifications of a typical profiler. *See* DOUGLAS & OLSHAKER, *supra* note 32, at 29-32. He indicates that most profilers have a background in psychology and organized criminology. *See id.* at 29. In addition, the profiler is an organized thinker, has field experience in criminal investigation, and exhibits the ability to make judgments based on instinct. *See id.* at 30-31.

65. *See* HOLMES & HOLMES, *supra* note 23, at 7.

66. *See id.* at 4.

67. *See id.* at 32. After conducting interviews with numerous sexual homicide offenders, researchers at the FBI found that a precipitating stressful event was frequently the catalyst for the offenders' crimes. *See id.* at 45. Such stressful events included: (1) conflict with females or parents, (2) problems with finances, employment or marriage, (3) birth of a child, (4) legal problems, or (5) the death of someone close to the offender. *See id.* at 46-47. Most offenders claimed problems with women as the precipitating stressful event. *See id.* at 46.

68. *See* Anthony J. Pinizzotto, *Forensic Psychology: Criminal Personality Profiling*, 12 J. POLICE SCI. & ADMIN. 32, 39 (1984).

this knowledge, a profiler understands how criminals operate and, thus, can develop a sense about a particular offender.<sup>69</sup>

### *B. Judicial Reaction to Criminal Psychological Profiles*

Judicial use of criminal psychological profiling has a poor track record as a result of misunderstanding, misuse, and misapplication, and, thus, such testimony will usually not be admitted at trial.<sup>70</sup> Even when trial courts do admit such testimony into evidence, appellate courts tend to reverse trial courts' decisions to do so.<sup>71</sup> Courts' refusal to admit into evidence criminal psychological profiles is based on the grounds that they constitute impermissible character testimony,<sup>72</sup> improper subjects for scientific or expert testimony,<sup>73</sup> and unduly prejudicial evidence.<sup>74</sup> Some courts, however, have permitted the use of profiles for the purpose of making probable cause determinations and linking crimes.<sup>75</sup> Appellate courts have generally upheld these decisions.<sup>76</sup>

In 1988, the Ohio Court of Appeals in *State v. Haynes* reversed the trial court's decision to permit the testimony of a criminal profiler in a criminal case.<sup>77</sup> In *Haynes*, the defendant, Richard Haynes, faced murder charges after he killed Douglas Fauver, a potential employer,

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69. *See id.*

70. It took nearly ten years for any court to accept testimonial use of behavioral science as it applied to profiling. *See* DOUGLAS & OLSHAKER, *supra* note 32, at 294. Special Agent Jud Ray became the first member of the FBI's Investigative Support Unit to testify using criminal psychological profiling. *See id.* He testified in the case against Kirby Anthony, who faced charges relating to the murders of a mother and her two young children. *See id.* at 283, 289. At trial, the prosecutor sought to have Ray certified as an expert and testify regarding the profile that he generated which led to Anthony's arrest. *See id.* at 294. The judge refused to admit the profile but permitted Ray to testify about the defendant's post-offense behavior and how it reflected his guilt. *See id.* Based in part on Ray's testimony, the jury convicted Anthony. *See id.*; *cf.* DOUGLAS & OLSHAKER, *supra* note 32, at 298.

71. *See, e.g.,* *Penson v. State*, 474 S.E.2d 104, 106-07 (Ga. Ct. App. 1996); *State v. Roquemore*, 620 N.E.2d 110, 112-17 (Ohio Ct. App. 1993); *cf.* *State v. Fain*, 774 P.2d 252, 257 (Idaho 1989) (upholding trial court's exclusion of a "psychological profile" prepared by the FBI).

72. *See Penson*, 474 S.E.2d at 106.

73. *See Fain*, 774 P.2d at 257.

74. *See State v. Haynes*, No. 4310, 1988 WL 99189, at \*4 (Ohio Ct. App. 1988).

75. *See* DOUGLAS & OLSHAKER, *supra* note 1, at 252.

76. *See Pennell*, 1989 WL 112555 at \*8-\*9.

77. *See State v. Haynes*, No. 4310, 1988 WL 99189 (Ohio Ct. App. 1988).

in a knife fight.<sup>78</sup> Over the defendant's objections, the trial court permitted the state to introduce testimony from an expert in "criminal profiles" to rebut Haynes's self-defense claim and prove that his acts constituted a purposeful and calculated anger-retaliatory murder.<sup>79</sup> The Ohio Court of Appeals, however, disagreed with the trial court and stated that the testimony from the criminal profiler should not have been admitted because it constituted impermissible character evidence and had a prejudicial impact on the jury.<sup>80</sup> As a result, the appellate court reversed Haynes's conviction.<sup>81</sup>

More recently, the Court of Appeals of Georgia ruled that a trial court committed reversible error by admitting into evidence an FBI serial arsonist profile.<sup>82</sup> In *Penson v. State*, the defendant was convicted of burglary and arson based on his illegal entrance and subsequent setting of a fire in a county rescue building.<sup>83</sup> During its presentation of evidence, the State introduced an FBI serial arsonist profile that contained information on the findings of a study of serial arsonists.<sup>84</sup> The trial court admitted the evidence despite the facts that the defendant was not charged with serial arson and the profile was not used by police during their investigation.<sup>85</sup> The State used the profile in connection with witnesses who testified regarding the defendant's personal history and personality.<sup>86</sup> In effect, the defendant was implicitly compared to the serial arson profile.<sup>87</sup> The

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78. *See id.* at \*1.

79. *See id.*

80. *See id.* at \*4-\*5.

81. *See id.* at \*7.

82. *See Penson v. State*, 474 S.E.2d 104, 106-07 (Ga. Ct. App. 1996).

83. *See id.* at 105.

84. *See id.* at 106.

85. *See id.*

86. *See id.* This testimony included statements that the defendant was twenty-six years old, lived alone, had a tenth-grade education, was unemployed, did not own a car, and lived within walking distance of the county rescue building that was set on fire. *See id.*

87. *See id.* Immediately after eliciting the testimony of the defendant's characteristics that matched the profile, the State introduced the fire marshall who presented the profile evidence. *See id.* The Georgia Court of Appeals, however, deemed this use of a criminal psychological profile improper and determined that the evidence should have been excluded. *See supra* Part II.A. The testimony did not reflect a specific profile that had been created based upon the examination of the crime scene and crime scene evidence, but, rather, it reflected a general profile of a serial arsonist. *See Penson*, 474 S.E.2d at 106. *See generally* HOLMES & HOLMES, *supra* note 23, at 92-112 (providing a summary of how to profile an arson).

appellate court wasted little time in declaring that the testimony constituted impermissible character evidence as the defendant had not placed his character at issue.<sup>88</sup> As a result, the court reversed the defendant's conviction.<sup>89</sup>

In the above two cases, the profile evidence failed to pass muster at the appellate level. However, criminal psychological profiles have had more success when used to support probable cause for a search.<sup>90</sup> In *State v. Pennell*, the FBI generated a profile based on evidence obtained from two murder victims who were killed under similar circumstances.<sup>91</sup> The profile indicated that the offender was probably a white male, twenty-five to thirty-five years old, who worked in the construction trades and lived near the area where the crimes occurred.<sup>92</sup> The profile also stated that the perpetrator would drive a van with high mileage, cruise the streets looking for a victim, and portray a macho image while dominating women.<sup>93</sup> In addition, the offender would choose disposal sites in areas with which he was familiar.<sup>94</sup> From this profile, the police tailored their investigation to target individuals that fit the profile's description.<sup>95</sup>

The police implemented a sting operation and posted along highways a female officer dressed as a prostitute to attract the offender.<sup>96</sup> She was instructed to pay attention to any van that stopped to pick her up.<sup>97</sup> Eventually, a driver of a van who matched the description of the profile approached the officer, and the officer surreptitiously began to remove carpet fibers from the van's floor in order to compare them with fibers obtained from the murder

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88. See *Penson*, 474 S.E.2d at 106.

89. See *id.* at 106-08.

90. See *Brinegar v. United States*, 338 U.S. 160, 171-73 (1949) (admissibility is not a problem when seeking search warrants because the evidence used to obtain a search warrant need not be based on evidence admissible at trial).

91. See *State v. Pennell*, 1989 WL 112555, at \*2 (Del. Super. Ct. 1989). See generally DOUGLAS & OLSHAKER, *supra* note 1, at 252-54 (providing the history of *State v. Pennell* from the FBI's perspective).

92. See *Pennell*, 1989 WL 112555, at \*2.

93. See DOUGLAS & OLSHAKER, *supra* note 1, at 252.

94. See *id.*

95. See *id.* at 252-53.

96. See *id.* at 253.

97. See *id.*

victims.<sup>98</sup> Upon analysis of the carpet fibers, the FBI found that they matched the fibers found on the other two victims.<sup>99</sup> After his arrest, the defendant moved to suppress the fibers as well as other evidence obtained as a result of search warrants based partially upon the fibers seized.<sup>100</sup> The court upheld the seizure in part because of the FBI profile that established probable cause to remove the fibers.<sup>101</sup> The defendant was later convicted and executed for the multiple homicides in part because the trial court also permitted the testimony of a criminal profiler regarding the signature aspects of the crime and an analysis of those aspects.<sup>102</sup>

More recently, the Colorado Court of Appeals upheld a search warrant based on an FBI profile even though the truth of other statements in the search warrant had been questioned.<sup>103</sup> In *People v. Genrich*, the defendant faced charges of extreme indifference homicide for detonating three pipe bombs that injured one person and killed two people.<sup>104</sup> After he was convicted, the defendant appealed the trial court's refusal to hold a veracity hearing<sup>105</sup> regarding the search warrant used by police to obtain bomb components from the defendant's residence.<sup>106</sup> The defendant argued that certain statements within the affidavit used to obtain the search warrant were contradicted by other police reports at the time that the affidavit was signed.<sup>107</sup> The court stated that, even without the contested information, the remaining information, which included an FBI profile that significantly matched the defendant, was sufficient to

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98. *See id.*

99. *See id.*

100. *See State v. Pennell*, 1989 WL 112555, at \*1 (Del. Super. Ct. 1989).

101. *See id.* at \*9.

102. *See DOUGLAS & OLSHAKER, supra* note 1, at 253. Criminal profiler John Douglas's testimony focused on the signature aspects that were revealed through the methods of torture employed by Pennell. *See id.* These aspects included the use of tools on the victim's sexual organs. *See id.* In addition, all of the wounds were inflicted before the victim's death. *See DOUGLAS ET AL., supra* note 25, at 265. All of the evidence indicated Pennell's desire to dominate his victims and make them suffer. *See id.*

103. *See People v. Genrich*, 928 P.2d 799, 804-05 (Colo. Ct. App. 1996).

104. *See id.* at 800-01.

105. A veracity hearing tests the sufficiency of an officer's affidavit for a search warrant. *See id.* at 804.

106. *See id.*

107. *See id.*

uphold the validity of the affidavit.<sup>108</sup>

Finally, the Pennsylvania Supreme Court has suggested that a profile may even be necessary in cases in which the state seeks to introduce evidence of similar acts.<sup>109</sup> In *Commonwealth v. Hawkins*, the Montgomery County District Attorney attempted to introduce against the defendant evidence of a prior criminal act that the defendant allegedly committed in 1981.<sup>110</sup> The court ruled that the evidence was impermissible because it had no connection to the case at bar.<sup>111</sup> However, while the details in both cases were strikingly similar,<sup>112</sup> the court was nevertheless unconvinced and ended its opinion by stating that "there is no evidence in this case of serial killings or a *sophisticated psychological profile* that applies to [the defendant]."<sup>113</sup>

### III. THE USE OF EXPERT TESTIMONY

Courts have long struggled with the use of expert testimony at trial.<sup>114</sup> In the past, problems centered around scientific and medical testimony.<sup>115</sup> Only recently have courts faced questions regarding the admissibility of social science evidence.<sup>116</sup> This section examines the

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108. *See id.* at 805.

109. *See Commonwealth v. Hawkins*, 626 A.2d 550, 553-54 (Pa. 1993).

110. *See id.* at 552.

111. *See id.* at 553.

112. *See id.* at 552. The Commonwealth pointed to the similarities between the two cases including the fact that both victims were black, ages 14-15, female, Seventh Day Adventists, and students at the same school. *See id.* Both murders took place on hot days in the second-floor bedrooms of houses where the defendant's family, but not the defendant, resided. *See id.* Also, both victims had been strangled to death, found in the nude, stabbed, subjected to vaginal trauma, and suffered a blow to the back of the head. *See id.* Both crime scenes evidenced staging of a burglary or robbery and, additionally, the defendant washed his clothes after both incidents, admitted horseplaying with the victims, and claimed they were flirting with him. *See id.* at 551-53.

113. *Id.* at 553 (emphasis added).

114. *See* Edward J. McDermott, *Needed Reforms in the Law of Expert Testimony*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 698 (1911) (discussing problems surrounding the reliability of experts receiving payment to give testimony).

115. *See id.* at 699. Medical experts were the most frequent type of experts called to testify. *See id.* However, many problems existed with their testimony, such as: (1) a lack of consensus among experts, (2) the unethical performance of many experts that testified about anything so long as they were paid, and (3) the use of "experts" who lacked the requisite qualifications to testify about a particular subject. *See id.* at 699-702.

116. One of the first notable uses of social science evidence was cited in *Brown v. Board of*



history of expert testimony, beginning with the *Frye*<sup>117</sup> standard, and follows through to the Supreme Court's recent *Daubert*<sup>118</sup> principle. In presenting this history of expert testimony, this section will focus on scientific evidence as well as psychological and sociological evidence in the criminal context.<sup>119</sup>

### A. The Frye Standard

James Alphonzo Frye was charged with second degree murder.<sup>120</sup> During his trial, he attempted to introduce evidence of a systolic blood pressure deception test.<sup>121</sup> The defendant claimed that this test would determine if he told the truth regarding his claim of innocence.<sup>122</sup> To support its admission, the defendant argued:

... the opinions of experts ... are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are

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*Education* where the Court cited sociological studies indicating the detrimental effects of separate-but-equal schools. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

117. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

118. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

119. Both types of evidence are used because criminal psychological profiles involve the use of forensic evidence and are based on psychological and sociological principles. See *supra* Part II.A.

120. See *Frye*, 293 F. at 1013.

121. See *id.* at 1013. The systolic blood pressure deception test was an early attempt at a lie detector device, a forerunner of the modern polygraph. See EUGENE B. BLOCK, *LIE DETECTORS: THEIR HISTORY AND USE* 25 (1977).

122. See *Frye*, 293 F. at 1013-14. The test measured the change in blood pressure when an individual responded to questions. See *id.* at 1013. In theory, the test would register an increase in blood pressure when the person lied. See *id.* at 1014.

admissible in evidence.<sup>123</sup>

The court concurred in the statement of the rule but found that the systolic blood pressure deception test did not meet the required "standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."<sup>124</sup> From that opinion, the nation's courts established the necessary requirements for expert testimony.<sup>125</sup>

Despite its widespread use, the *Frye* test has critics. Its greatest challenge arose as states adopted the Federal Rules of Evidence, which established an arguably different standard for the admission of expert testimony.<sup>126</sup> An example of how the *Frye* test conflicted with the Federal Rules of Evidence was demonstrated by the debate regarding the admission of deoxyribonucleic acid ("DNA") evidence.<sup>127</sup> The first case that dealt with DNA evidence was

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123. *Id.* at 1014.

124. *Id.* However, three years after the D.C. appellate court ruled against his appeal, Frye was released from his life sentence due to the fact that someone else confessed to the crime. See BLOCK, *supra* note 121, at 26.

One thing the *Frye* test does not require is perfect reliability. Evidence may be admitted even if reasonable experts may disagree and the science underlying the opinion is not absolute. Time of death determinations provide a good illustration of this type of admissible evidence. See Edward J. Imwinkelried, *Forensic Science: Time of Death Determinations*, 30 CRIM. L. BULL. 76, 77 (1994). According to one article, time of death analysis is not an exact science as many variables can affect the determination, and the assessment can become more difficult as more time passes. See *id.* at 76-77. Still, trial courts admit such evidence because it assists the jury with their fact-finding determinations. See *United States v. Maravilla*, 907 F.2d 216 (1st Cir. 1990) (stating that the district court did not abuse its discretion in concluding that a pathologist's report determining the time of death would assist the trier of fact).

In *Maravilla*, the district court permitted testimony from a doctor who had not observed the victim's body but only examined pictures. See *id.* at 219. Based solely on the degree of decomposition and evidence provided by the prosecutor, the doctor determined the time of death. See *id.* at 219-20. Despite some skepticism, the court upheld the admission of the evidence. See *id.* at 221; cf. Imwinkelried, *supra* at 77 (stating that courts have been receptive to time of death determinations while realizing the imprecision of such determinations).

125. See BLOCK, *supra* note 121, at 25.

126. Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

127. See Paul C. Gianelli, *Criminal Discovery, Scientific Evidence and DNA*, 44 VAND. L. REV. 791 (1991); Note, *DNA Profiling Evidence: The Need for a Uniform and Workable Evidentiary Standard of Admissibility*, 26 VAL. U. L. REV. 595 (1992); Comment, *DNA*

*Andrews v. State*.<sup>128</sup> In *Andrews*, the Florida court acknowledged the question of the continuing vitality of the *Frye* test in light of the new federal evidence rules.<sup>129</sup> After discussing the two approaches, the court decided to apply the “relevancy approach,”<sup>130</sup> which focuses on the relevancy of the evidence and the degree to which it assists the trier of fact. As a result, the court permitted the use of DNA evidence due to the reliability of the procedures involved and the qualifications of the scientists performing the test.<sup>131</sup>

### B. The Daubert Principle

Rule 702 of the Federal Rules of Evidence provides an alternative standard for the admission of expert testimony.<sup>132</sup> The Rule focuses on whether the scientific, technical, or specialized evidence will “assist the trier of fact” and requires that the person giving such evidence be qualified as an expert through “knowledge, skill, experience, training or education.”<sup>133</sup> Rule 702 does not mention any requisite general acceptability or reliability of the evidence and, therefore, courts previously were split as to whether the new Rule lowered the standard created in *Frye*.<sup>134</sup> However, in 1993, the

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*Fingerprinting and Its Impact Upon Criminal Law*, 41 MERCER L. REV. 1453 (1990).

128. *Andrews v. State*, 533 So.2d 841 (Fla. Dist. Ct. App. 1988). The rape victim in this case alleged that she was attacked by a strong black male. *See id.* at 842. From the semen left after the rape, the police discovered that the offender had O-type blood. *See id.* at 843. In order to connect the defendant to the crime, the police had DNA tests conducted on the semen and a blood sample from the defendant. *See id.* The lab followed a specific procedure to determine if the DNA samples matched. *See id.* First, the DNA was cut at precise points, measured, and transferred to a piece of nylon membrane. *See id.* at 848. Then, radioactive probes that were programmed to recognize certain DNA fragments were inserted into the DNA samples. *See id.* The DNA was then photographed by exposing x-ray film to the radioactive probes, and, once photographed, the DNA samples were compared to determine whether a match existed. *See id.*

129. *See id.* at 843-44.

130. *See id.* at 846-47. The “relevancy approach” permits relevant expert testimony that will assist the trier of fact. *See id.* at 846. Implicitly, the evidence, in order to be relevant, must be reliable. *See id.*

131. *See id.* at 849-50.

132. *See* FED. R. EVID. 702.

133. *Id.*

134. *Compare* United States v. Shorter, 809 F.2d 54, 59-60 (applying the “general acceptance” standard), *with* DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941, 955 (3d Cir. 1990) (rejecting the “general acceptance” standard).

Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*<sup>135</sup> announced a clear standard for scientific expert testimony in the federal courts.<sup>136</sup>

After providing a detailed history of the *Frye* standard and the Federal Rules of Evidence, the Court put forth the two-part test for admitting scientific expert testimony based on Rule 702.<sup>137</sup> The test consists of a determination by the trial judge of whether the expert will be testifying “to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”<sup>138</sup> First, the Court determined that the “scientific knowledge” requirement created an evidentiary reliability standard that required the expert’s inference or assertion to arise from the scientific method, *i.e.*, appropriate validation.<sup>139</sup> Second, the Court interpreted the words “assist the trier of fact to understand the evidence or to determine a fact in issue” as a relevancy requirement.<sup>140</sup> To be relevant, the evidence must relate to some issue in the case and provide a valid scientific connection to the pertinent inquiry.<sup>141</sup> In summary, the Court required that the evidence “rest on a reliable foundation and is relevant to the task at hand.”<sup>142</sup>

### C. Admitting Non-Scientific Evidence

Even before the creation of the *Daubert* principle, courts struggled

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135. 509 U.S. 579 (1993).

136. *See id.* at 582.

137. *See id.* at 585-89, 592. It is important to note that the Court limited its holding to the admissibility of scientific expert testimony. *See id.* at 590 n.8. Other courts refuse to apply *Daubert* to types of evidence other than the scientific evidence discussed by the Court. *See, e.g.*, *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1041 (S.D.N.Y. 1995). In addition, commentators have not been enthusiastic about the application of *Daubert* to quasi-scientific evidence. *See, e.g.*, Lisa M. Agrimonti, Note, *The Limitations of Daubert and its Misapplication to Quasi-Scientific Experts, A Two-Year Case Review of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 WASHBURN L.J. 134 (1995). This leaves open the question of the standard for technical or other specialized knowledge. *See id.*

138. *Daubert*, 509 U.S. at 592.

139. *See id.* at 590. Whether the proposed evidence is valid requires an analysis of: (1) whether the conclusion to be drawn from the evidence can be tested; (2) whether the procedure and basis for the conclusion has been subjected to peer review and publication; (3) the potential rate of error of the scientific technique involved; and (4) standards of control for the technique’s operation. *See id.* at 593-94.

140. *Id.* at 591.

141. *See id.* at 591-92.

142. *Id.* at 597.

with the admissibility of social science evidence in the courtroom.<sup>143</sup> Courts routinely recognized the need for psychological testimony when the issues involved sanity and competency to stand trial.<sup>144</sup> However, when the same psychologists began testifying in cases involving rape trauma syndrome, battered wife syndrome, the fallibility of eyewitness identification and the psychology of child abuse, the courts created various arguments to exclude the evidence.<sup>145</sup> At the root of these arguments was a distrust of social science evidence.<sup>146</sup> Courts have often cited problems with this type of evidence, such as the lack of certainty surrounding its conclusions and the inability of judges and juries to properly analyze the methodology.<sup>147</sup>

When the Supreme Court articulated the *Daubert* principle, the debate shifted to whether the principle covered psychological evidence.<sup>148</sup> Some claim that the evidence is not science and, therefore, the standard does not apply.<sup>149</sup> Others argue that *Daubert* does apply because psychological evidence has a strong scientific foundation.<sup>150</sup> Still others believe that because *Daubert's* principle created such a liberal standard, the evidence would come in regardless of the strength of psychological evidence's scientific foundation.<sup>151</sup> Despite the lack of uniformity in these arguments, courts have yet to decide conclusively in favor of any side.

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143. See David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 21-24 (1987).

144. See *id.* at 23.

145. See *id.* at 24-26.

146. See Constance R. Lindman, Note, *Sources of Judicial Distrust of Social Science Evidence: A Comparison of Social Science and Jurisprudence*, 64 IND. L.J. 755, 755 (1989).

147. See Joseph A. Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51, 55 (1988).

148. See generally Agrimonti, *supra* note 137.

149. See Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2273-74 (1994) (rejecting the application of the *Daubert* test to nonscientific expert evidence).

150. See Krista L. Duncan, Note, *"Lies, Damned Lies, and Statistics"? Psychological Syndrome Evidence in the Courtroom After Daubert*, 71 IND. L.J. 753, 771 (1996).

151. See C. Robert Showalter, *Distinguishing Science from Pseudo-Science in Psychiatry: Expert Testimony in the Post-Daubert Era*, 2 VA. J. SOC. POL'Y & L. 211, 224-25 (1995).

#### IV. THE ADMISSIBILITY OF CRIMINAL PSYCHOLOGICAL PROFILES

##### *A. Character Evidence*

Most courts that have excluded criminal psychological profiles have done so on the grounds that they constitute impermissible character evidence.<sup>152</sup> Although there is no express definition of character evidence,<sup>153</sup> courts have attempted to define the term.<sup>154</sup> One court has stated that character evidence refers to "the disposition or propensity of a defendant to commit certain crimes, wrongs or acts."<sup>155</sup> Other courts have focused on the perpetrator's behavior as opposed to the specific crime involved. For example, an Oregon court defined character evidence as a person's disposition or propensity toward certain behavioral traits such as honesty, truthfulness, temperance, carefulness, or peacefulness.<sup>156</sup> The court also stated that character evidence refers to a person's tendency to act in a certain way in various situations of life.<sup>157</sup> Both interpretations, however, include one common theme: character evidence refers to a person's propensity or disposition to act in a certain way.<sup>158</sup> As a result, the key inquiry to identify character evidence hinges upon whether the evidence tends to show a person's propensity to do something.

In contrast, a criminal psychological profile does not refer to a

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152. See *Penson v. State*, 474 S.E.2d 104 (Ga. Ct. App. 1996); *State v. Haynes*, No. 4310, 1988 WL 99189 (Ohio Ct. App. 1998).

153. See CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., 22 FEDERAL PRACTICE AND PROCEDURE § 5233, at 349-50 (1978).

154. See *id.* at 350.

155. *Getz v. State*, 538 A.2d 726, 730 (Del. 1988).

156. See *State v. Marshall*, 823 P.2d 961, 963 (Or. 1991). After his conviction for robbery and burglary, the defendant appealed, claiming that the trial court improperly refused to hear testimony from the defendant's witness regarding the crime victim's propensity to give people property as collateral for her debts and then claim that the same property had been stolen. See *id.* at 961-62. The Oregon Supreme Court affirmed the conviction by stating that the trial court had properly excluded the testimony. See *id.* at 964-65. While the defendant's witness was permitted to give her opinion regarding the victim's reputation for truthfulness, further questioning regarding the nature of the lies told by the victim "was the functional equivalent of asking the witness to relate specific instances of conduct as proof of the character trait of the victim for untruthfulness." *Id.* at 964.

157. See *id.* at 963-64.

158. Most treatises on evidence draw this same parallel. See, e.g., RICHARD D. FRIEDMAN, *THE ELEMENTS OF EVIDENCE* 231-32 (1991); JOHN HENRY WIGMORE, *WIGMORE ON EVIDENCE* § 52, at 446 (3d ed. 1940).

person's propensity to act in a certain way, nor does it relate to general character traits.<sup>159</sup> The case of *State v. Pennell* illustrates this point.<sup>160</sup> Without any known suspects, the police conducted an investigation based on a profile containing information such as the offender's age, residence, profession, type of vehicle, marital status, and image.<sup>161</sup> Most of the profile consisted of a demographic description of the offender, which is similar to information police would use in searching for a suspect based on eye-witness information. The prohibition on character evidence did not bar the admission of a description in eye-witness cases, and, therefore, it should not be barred in profile cases.

Moreover, the "macho image" and domination of women illustrations in the *Pennell* profile might be considered character traits similar to honesty or carefulness.<sup>162</sup> However, the fact that it is character evidence is not enough to bar its admission.<sup>163</sup> The evidence must also be offered to show that the person acted in conformity with the trait on a particular occasion.<sup>164</sup>

Thus, admission of a profile would require that the profile is to be used for a purpose other than to show action in conformity with a defendant's character.<sup>165</sup> Such other purposes include motive, intent,

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159. There is some case law to support this point. In *Nolte v. State*, 854 S.W.2d 304 (Tex. Ct. App. 1993), the Court of Appeals of Texas found that expert testimony that dealt with profiles of those who typically sexually abuse children was not character evidence. *See id.* at 309. The court defined character evidence as a "generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance, or peacefulness." *Id.* In addition, the court stated that the expert's testimony only compared the profile of a typical sex abuser to the defendant. *See id.* Like a sex abuser profile, a criminal psychological profile provides information about an offender that does not involve the offender's generalized disposition or the offender's disposition toward a general trait. This follows from the fact that a criminal psychological offender's profile is derived from a specific crime scene and defines a particular person.

160. *See State v. Pennell*, 1989 WL 112555 (Del. Super. Ct. 1989).

161. *See DOUGLAS & OLSHAKER, supra* note 1, at 252.

162. *See id.*

163. *See* FED. R. EVID. 404(a). Federal Rule of Evidence 404(a) specifies that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." FED. R. EVID. 404(a).

164. *See id.*

165. The Federal Rules of Evidence permit the use of character evidence for purposes other than showing action in conformity with character on a particular occasion:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be

a common scheme or plan, signature, preparation, or identity.<sup>166</sup> For example, in the *Pennell* case, the purpose of introducing the profile might have been to show the defendant's motive in that the defendant enjoyed dominating women.<sup>167</sup> In addition, the macho image portrayed by the defendant provided insight into his identity as opposed to showing an action in conformity with a character trait.<sup>168</sup>

The contents of a profile can also establish a perpetrator's common plan, which constitutes an admissible purpose under the Federal Rules of Evidence Rule 404(b).<sup>169</sup> Many offenders who commit acts similar to those in *Pennell* claim insanity.<sup>170</sup> The contents of a profile can rebut such a claim by illustrating a common plan through the signature analysis of several killings.<sup>171</sup> The profile can also provide evidence of motive and preparation by demonstrating that the offender not only appreciated the criminality of his or her actions, but planned them and had a reason for committing the crimes.<sup>172</sup> In summary, the aforementioned purposes for admitting profiles do not attempt to show action in conformity with character, and, as a result, the contents of a profile and the profile itself should not be excluded from evidence on the grounds that it is an impermissible use of character evidence.

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admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID 404(b).

166. *See id.*

167. *See DOUGLAS & OLSHAKER, supra* note 1, at 252. As is often the case, people attempt to understand why a person has committed these shocking acts. *See id.* at 30. A profile that includes a trait such as the enjoyment of dominating women provides substantial evidence of motive.

168. *See id.* at 252-53. In the *Pennell* case, the New Castle police searched for a person matching that description. *See id.* at 252. This information provided a clue to the offender's identity, and the in-court use of the information supported the court's conclusion that the defendant committed the act. *See id.* at 252-53.

169. *See* FED. R. EVID. 404(b).

170. *See* DOUGLAS AND OLSHAKER, *supra* note 1, at 239-51.

171. *See id.*

172. The Model Penal Code provision regarding the insanity defense states: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01.



### *B. Scientific Evidence*

In addition to excluding criminal psychological profiles on the grounds that they constitute improper character evidence, courts have also refused to hear such evidence because it is not a proper subject for expert testimony.<sup>173</sup> While this reason for refusing admission is based partly on uncertainty about the proper standard for admission, courts have often refused to admit the evidence due to improper use of such evidence by its proponent or a misunderstanding on the part of a judge.<sup>174</sup>

Federal Rule of Evidence 702 permits expert opinion testimony when it relates to "scientific, technical and other specialized knowledge."<sup>175</sup> This presents a problem for criminal psychological profiling because it remains unclear into which category such evidence should fall. As illustrated in Part III of this Note, certain types of psychological evidence fall under the umbrella of scientific evidence.<sup>176</sup> However, limiting criminal psychological profiling to only psychological evidence diminishes the significance of other elements of profiling such as its criminological and sociological aspects. While criminology falls under the scientific evidence category, sociology has been the subject of much debate.<sup>177</sup> Some argue that criminal psychological profiles are not scientific evidence because they employ social science theories.<sup>178</sup> Furthermore, these arguments view syndromes such as "battered wife" syndrome and "rape victim" syndrome as types of psychological evidence that do not fall under the traditional uses for scientific psychological testimony.<sup>179</sup> Placing social science evidence in that context raises a question about the proper standard for admission of non-scientific evidence because courts have not established relevant criteria for admission.<sup>180</sup> As a result, to properly admit such evidence, the

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173. See *State v. Roquemore*, 620 N.E.2d 110 (Ohio Ct. App. 1993); *State v. Haynes*, No. 4310, 1988 WL 99189 (Ohio Ct. App. 1988).

174. See *Penson v. State*, 474 S.E.2d 104, 106-07 (Ga. Ct. App. 1996).

175. FED. R. EVID. 702.

176. Cf. *McCord*, *supra* note 143, at 23-34.

177. See *Lindman*, *supra* note 146, at 755.

178. See *Imwinkelried*, *supra* note 149, at 2273.

179. See *id.*

180. See *Agrimonti*, *supra* note 137, at 152-55.

proponent must argue that profiles are scientific evidence or that the scientific standard in *Daubert* also applies to technical or other specialized knowledge.

A proponent of criminal psychological profiles has a stronger argument for admission under the *Daubert* principle.<sup>181</sup> Under *Daubert*, admissible expert testimony must be based on valid scientific principles and relevant to some issue in the case.<sup>182</sup> While the Court in *Daubert* specifically limited its holding to scientific evidence,<sup>183</sup> lower courts have extended it to non-scientific and quasi-scientific evidence.<sup>184</sup> Criminal psychological profiles can be deemed quasi-scientific because they are created through a scientific process.<sup>185</sup> Therefore, by labeling criminal psychological profiling as quasi-scientific evidence, the *Daubert* principle can be used to determine the admissibility of criminal psychological profiles. In addition, such profiles may be highly relevant to some issue in the case in that they may support theories of a perpetrator's motive, identity, common scheme, or preparation in committing the offense. For example, a profiler can look at a crime scene and understand why a person committed certain acts and can determine what type of person committed the acts.<sup>186</sup> As a result, when testifying regarding criminal psychological profiles, a profiler would provide information regarding motive and identity that would strengthen the prosecution's case against the defendant.

Criminal psychological profiles must also be reliable in order to assist the trier of fact.<sup>187</sup> The *Daubert* Court established four factors to determine the reliability of admissible expert testimony with no one factor receiving greater weight than another and none held as

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181. Profiling employs a method similar to a scientific method in that a profiler observes the evidence, creates a hypothetical person, and tests the results to eliminate inconsistencies. See Douglas et al., *supra* note 24, at 405. Where profiles differ from typical scientific evidence is in the basis for profiles' conclusions: A profile rests on psychological and sociological principles. See HOLMES & HOLMES, *supra* note 23, at 3. In contrast, most scientific evidence rests on the more solid foundation of "hard science." See McCord, *supra* note 143, at 21-22 n.2.

182. See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589-92 (1993).

183. See *id.* at 590 n.8.

184. See Agrimonti, *supra* note 137, at 149-52.

185. See Douglas et al., *supra* note 24, at 405.

186. See DOUGLAS & OLSHAKER, *supra* note 32, at 43.

187. See *Daubert*, 509 U.S. at 589.

dispositive.<sup>188</sup> These include: (1) whether the conclusion can be tested, (2) whether the procedure and basis of conclusion has been subjected to peer review and publication, (3) the test's potential rate of error and, and (4) standards of control for the technique's operation.<sup>189</sup>

A profiler's determination, by nature, can be tested and proven accurate only if a person is caught and later confesses. Nonetheless, one study attempting to test the validity of profiles found that trained profilers were usually accurate in predicting the type of person who committed an offense.<sup>190</sup> In addition to the accuracy study, several other scholars, investigators, and psychologists have recognized criminal profiling as a legitimate method of understanding criminal behavior.<sup>191</sup> As previously mentioned, the procedures involved in the construction of a criminal psychological profile are extensive. Such processes, as well as the profile itself, are subject to constant review to determine whether they are accurate and fully reflect all of the evidence gathered in a case.<sup>192</sup> If inconsistencies are found between evidence and a profile, the profiler will adapt the description to fit the evidence from the crime.<sup>193</sup>

The only factor not applicable to the profiling process is the

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188. See *id.* at 593-95.

189. See *id.*

190. See Anthony J. Pinizzotto & Norman J. Finkel, *Criminal Personality Profiling: An Outcome and Process Study*, 14 LAW & HUM. BEHAV. 215 (1990). The study gathered twenty-eight subjects from five different backgrounds. See *id.* at 218-29. Four of the subjects were profiling experts who trained police at the FBI Academy, six were police detectives who had received profiling training, six were detectives who had no profiling training, six were clinical psychologists who were unfamiliar with criminal profiling, and six were undergraduate students with no exposure to personality profiling or criminal investigations. See *id.* Each subject received information about either a sex offense or a homicide, both of which were actual crimes that had been solved. See *id.* They were then asked to recall the information and write as many facts about their case as they could remember. See *id.* at 220. Subsequently, the subjects were asked to write the details that they felt were most important in creating a profile regarding characteristics of the offender and the reasons why these details were important. See *id.* The subjects then received the crime scene information again and were asked to create a profile of the offender using as much detail as possible. See *id.* After creating the profile, the subjects were asked to answer multiple-choice questions about the offender. See *id.* at 220-21. Finally, each subject was given a written description of five different people and asked which person was most likely to have committed the offense. See *id.* at 221.

191. See HOLMES & HOLMES, *supra* note 23, at 2.

192. See *supra* Part II.A.

193. See Douglas et al., *supra* note 24, at 57.

potential rate for error because it is impossible to determine whether a profile is wrong in that the absence of a confession does not necessarily indicate a defendant's innocence.<sup>194</sup> Similarly, an acquittal in a case where a profile is used does not equate to an inaccuracy in the profile. As a result, it is not possible to determine an error-rate for profiles.<sup>195</sup> Still, criminal psychological profiling meets three of the four factors enumerated in *Daubert*. Therefore, courts should view the evidence generated in a profile as sufficiently reliable because the underlying principles can be tested, the procedure and basis for a profile's conclusion is subject to peer review, and standards for control of the profiling technique's operation exist.

#### V. CONCLUSION

Since the 1970s, the FBI has employed criminal psychological profiling to apprehend serial and sexual offenders. By examining a crime scene and a victim, and using their knowledge of psychology and sociology, profilers can create a description of an offender that includes the person's age, occupation, personal history, and appearance. A profile also provides information such as the offender's level of education and important personality traits.

Despite the importance of profiles in investigating serial and sexual crimes, courts generally have not permitted their use in the prosecution and defense of criminal defendants. They have concluded that profiles are an impermissible use of character evidence or inappropriate subjects for expert testimony. As a result, trial courts that have admitted profiles as evidence have done so at the cost of

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194. Profiles are not always accurate. *See, e.g.*, *State v. Fain*, 774 P.2d 252, 257 (Idaho 1989). In addition, there may be procedural errors and bias involved in the profiling process. *Cf.* Chuck Green, *Profiler Slipped Up* (visited Jan. 20, 1998) <<http://www.denverpost.com/news/green8.htm>>. The JonBenet Ramsey murder investigation serves as an example of this point. *See id.* In that case, two former FBI criminal profilers formed different opinions regarding the culpability of JonBenet Ramsey's parents. *See id.* John Douglas performed an interview with both parents and ruled them out as the offenders. *See id.* However, Gregg McCrary found flaws in Douglas's procedure, citing the fact that Douglas interviewed the parents together rather than separately. *See id.*

195. It should be noted that the Pinizzotto and Finkel study found that the profilers were not 100% accurate in their predictions about the person who committed the offense. *See Pinizzotto & Finkel, supra* note 190, at 222-25.

reversal.

Nonetheless criminal psychological profiles should be admitted as evidence in criminal trials. Courts already permit some aspects of profiles into evidence as a means to connect multiple crimes to a single offender. Admission of full profiles would accomplish the same goal through additional methods. As a result, their use at trial would not be an impermissible use of character evidence. In addition, criminal psychological profiles are both relevant and reliable in that they have a basis in established psychological and sociological principles, and the procedures involved in constructing such profiles are subject to peer review and contain control mechanisms. As a result, courts should welcome the benefits of criminal psychological profiles in criminal trials.

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